STATE OF MICHIGAN

COURT OF APPEALS

LINDA BOYNTON,

Plaintiff-Appellant,

v

MEDALLION HOMES LIMITED PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED
April 24, 2003

No. 235939
Washtenaw Circuit Court
LC No. 99-011139-CP

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion to compel arbitration and denying plaintiff's motion for summary disposition. We affirm.

First, plaintiff argues the trial court erred in finding defendant was not required under the uniform mobile homes warranty act, MCL 125.991 *et seq.*, to warrant the mobile home it sold to her. We disagree.

Statutory interpretation presents a question of law that we review de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). In interpreting statutes, our primary goal is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The terms' fair and natural import should govern, *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998), and the Legislature is presumed to have intended the meaning it plainly expressed. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). If the plain and ordinary meaning of a statute's language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Toth v AutoAlliance Int'l (On Remand)*, 246 Mich App 732, 737; 635 NW2d 62 (2001). However, if reasonable minds can differ with respect to a statute's meaning, judicial construction is appropriate. *Adrian Sch Dist v Michigan Pub Sch Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998).

Section 3 of the mobile homes warranty act requires that new mobile homes sold by dealers in Michigan be covered by a warranty that "respectively appl[ies] to the manufacturer of the mobile home *and to the dealer* who sells the mobile home to the buyer in accordance with the terms of the warranty hereinafter specified." MCL 125.993 (emphasis added). Section 4

states the mobile home must "be covered by a *written warranty* from the *manufacturer or dealer*" and sets forth certain terms the warranty must contain, including terms that apply separately to the manufacturer and the dealer. MCL 125.994 (emphasis added).

Plaintiff asserts that the statute allows either the dealer or manufacturer to issue the written warranty, but the warranty must include the terms that apply to both. Meanwhile, defendant contends the provisions detailing the warranty's terms merely indicate what warranties must be included depending on which party issues the warranty. We agree with defendant. The clear and unambiguous language of MCL 125.994 is that either the manufacturer *or* the dealer must provide a written warranty. It does not provide that both must. The subsections of § 4 then provide what must be contained in any manufacturer warranty and what must be contained in any dealer warranty. In the case at bar, the manufacturer issued a written warranty. Therefore, the statute does not require defendant to do so as well. In fact, defendant's sales agreement specifically disclaims any warranties other than those imposed by law. Accordingly, the trial court correctly concluded that defendant did not provide a warranty and defendant could enforce the arbitration clause in the sales agreement.

Finally, plaintiff argues the trial court erred in finding defendant did not waive its right to arbitration where defendant failed to timely assert it as an affirmative defense and went forward with litigation, primarily by participating in judicial discovery. We disagree.

Whether the relevant circumstances establish a waiver of the right to arbitration constitutes a question of law, which we review de novo. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). However, we review for clear error the trial court's factual determinations regarding the applicable circumstances. *Id*.

A party may waive its right to arbitration. *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995). However, waiver is disfavored, and the party asserting waiver has occurred "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Madison, supra* at 588; *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998), quoting *Burns, supra* at 582. Whether a party has waived its contractual right to arbitration must be decided on the individual facts of each case. *Madison, supra* at 589.

Waiver of arbitration can occur when a party files a responsive pleading without asserting the right to arbitration. *Hendrickson v Moghissi*, 158 Mich App 290, 299; 404 NW2d 728 (1987); *Joba Const Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 179; 388 NW2d 251 (1986). Although defendant did not assert arbitration as an affirmative defense in its initial answer to plaintiff's complaint, it later amended that answer to include it—notably, after plaintiff stipulated to entry of an order allowing the amendment. The amended answer related back to the date of defendant's original answer. MCR 2.118(D). Therefore, defendant did not waive arbitration by failing to timely assert it as a defense.

Nonetheless, waiver may still occur even where a defendant properly pleaded arbitration as an affirmative defense. See *North West Michigan Constr Co v Stroud*, 185 Mich App 649, 651; 462 NW2d 804 (1990); *Campbell v St John Hosp*, 434 Mich 608, 617; 455 NW2d 695 (1990). For instance, "[p]ursuing discovery is regarded as being inconsistent with demanding arbitration, since discovery is not generally available in arbitration." *Joba, supra* at 178-179.

Although defendant answered plaintiff's interrogatories and filed notice that it intended to take plaintiff's deposition, which it later withdrew without acting on, defendant did not waive arbitration. This Court has found waiver based only on far more extensive actions inconsistent with arbitration, such as in-depth discovery, filing of summary disposition motions, or participation in mediation. See, e.g., *Madison, supra* at 596-597; *Salesin, supra* at 356-357; *Joba, supra* at 179. Therefore, the trial court did not err in holding defendant did not waive its right to arbitration.

Affirmed. Defendant may tax costs.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell